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NO. 74-1239

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

MITCHELL BROS. TRUCK LINES,
an Oregon corporation,

Petitioner,

v.

ELDON GILSTRAP, WARREN P. BLAND,
ROGER GILMORE, CLAUDIO MARTINEZ,
RAYMOND MORRIS and C. P. ZACHOW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

For brevity we will refer to petitioner Mitchell Bros. Truck Lines as defendant or Mitchell, and to respondents as plaintiffs.

The opinion of the Oregon Supreme Court appears as Appendix A in petitioner's brief. We have attached to this brief the two opinions of the trial court (the Circuit Court for Multnomah County, Oregon) as Appendices B and C, a copy of the equipment lease between plaintiffs and defendant (Appendix D) and pertinent portions of the collective bargaining agreement between the Teamsters and defendant (Appendix E). We have also followed defendant's numbering system, by numering the pages 1b, 2b, etc., for the four appendices.

STATEMENT OF FACTS

Defendant's perfervid brief does not comply with this court's Rule 23(4). Much of what passes as alleged facts is inaccurate and jaundiced. A new factual statement is mandated.

Plaintiffs are six former truck owners, who leased to defendant under standard form leases prepared by defendant (App D). They agreed to drive their own trucks as Mitchell's employees.

Shortly after the case was filed, for frankly retaliatory reasons, Mitchell terminated the leases of all six, and suspended all but one as drivers. Mitchell also impounded the trucks of two plaintiffs (for a time), threatened to cancel their insurance, and arrest them if they moved their own trucks from Mitchell's lot.

The class action aspect was ultimately denied. However, before a poll of driver

sentiment could be taken, defendant threatened that all who joined would be subject to a counterclaim, plus costs and disbursements.

Most lessors--and all drivers--are Teamster members. Over the years (in keeping with other Teamsters) the salary of the drivers has risen. But, unlike other carriers, Mitchell nullified these wage gains by deducting the driver's enhanced wages from lease payments. The result was an increase in wages to the drivers, but a decrease in lease payments in like amount. This practice was explicitly forbidden by the union agreement,[1] which specified that "mandatory" language prohibiting this be inserted in the lease itself.[2] Mitchell ignored this too. Moreover, the union contract required a

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1. Art. XXXI, § 6 (App E)

2. §19 of Article XXXI (App E)

copy of each individual lease be filed with the union. Instead, Mitchell filed a copy of a blank form of lease. (The critical portions of the union agreement appear in Appendix E. The lease is Appendix D).

Local 24, International Teamsters, etc. v. Oliver, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1958) discussed this identical clause in another lessor-driver case. Justice Brennan noted (1c 287):

> "The parties declare that 'the intent of this clause [the Article] ...is to assure the payment of the Union scale of wages...and to prohibit [a carrier from] the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages scales provided in this Agreement...[and] to prevent the continuation of or formation of combinations or corporations or so-called lease of fleet arrangements whereby the driver [of his own vehicle] is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of the running of his equipment, thus, in fact, reducing his scale of pay.'"

DECISION BELOW

Both the Circuit Court of Multnomah County and the Supreme Court of Oregon (unanimously and in banc) ruled that plaintiffs were entitled to reimbursement for federal highway use and federal fuel taxes, but were not entitled to recover for unpaid safety bonus or permit load compensation.

THE STATE COURT HAD JURISDICTION TO DECIDE THIS CASE

(A) This action is for breach of a lease agreement, a conventional common law action--well within the state court's jurisdiction and ken.

A critical fact, ignored by defendant, is that plaintiffs sue primarily as lessors for breach of the lease agreement. The union had no part in the negotiation of the lease. The union also declined to assist plaintiffs or any other lessors in enforcing the terms of the lease, as discussed more fully infra p 21.

The union intensely disliked leases because of the problem mentioned in the Oliver case.[3]

This case was brought in plaintiffs' capacity as lessors, and not as drivers.[4]

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3. See p 3 , supra.

4. Circuit Judge Olsen commented (1-2b) that: "plaintiffs first seek damages for breach of the Equipment lease as the same was amended by an oral agreement made in July, 1969... (with respect to) a bonus of 3/4 cent for each mile driven . ."
"In the second cause of action the plaintiffs seek payment of a bonus in the amount of 3 and 1/3 cent per mile driven by the plaintiffs while hauling 'permit loads'.
"The third cause of action relates to Paragraph 4 of the Equipment lease."

Only with respect to the fourth cause of action (the federal fuel tax) did he make any reference of any kind to the collective bargaining agreement (4b).

The Supreme Court of Oregon noted in its opinion that (2a):
"This is an action at law in which plaintiffs, owner-operators of commercial trucks, seek money damages for breach of certain lease agreements with defendant Mitchell Bros. Truck Lines."

The first two items (safety bonus and permit hauling) were oral promises made by Mitchell only to the lessors, and are not in the union agreement. The third item (highway use tax) is covered by the explicit and unambiguous language of the lease under which the:

> "Lessee [Mitchell] agrees to assume full responsibility for the equipment leased while the same is in Lessee's possession, said responsibility to include... highway use taxes...".

The fourth item (federal fuel tax) is covered by this same language since such tax is measured by highway usage and is "computed on the number of miles driven

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4. (cont)
Later the court added (5a): "In summary, plaintiffs are asserting rights based on the lease, the collective bargaining agreement, and oral promises allegedly made at the July 12 meeting.

The oral promises were modifications of the lease--not the collective bargaining agreement. The union did not participate in the July 12 meeting.

in the state on an average miles per gallon basis.[5]

It is true that further confirmation of Mitchell's responsibility for highway use and federal fuel taxes is found in the language of the union agreement (Art XXXI, Section 10) as both the Oregon Circuit Court and Supreme Court noted. (29a-33a,4b).

However, the primary basis of recovery throughout was the breach of the lease. The Oregon Supreme Court noted (24a):

> "First, this dispute does not relate to employer-employee relations. Although the plaintiffs are employees, their claims arise from the lease agreements. Thus the claims relate to lessor-lessee relations."

Plaintiffs were paid their wages as drivers. But they were shorted their lease payments by Mitchell, which insisted

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5. 26 USC §4040(a); IRS Publication 378 (rev 10-72); Asbury Transportation v. Consolidated Freightways Corp., 263 Or 53, 56, 501 P.2d 321, 322 (1972).

on deducting the highway use and federal fuel taxes, subsistence and driver's wages.

Not all the lessors were drivers. Neither were all drivers lessors.

(B) State courts retain jurisdiction over breach of contract actions whether under a collective bargaining agreement or otherwise.

This court has repeatedly made it clear that suits for breach of collective bargaining agreements under 29 USC 185a may be brought by employees against their employer or their union in appropriate cases in either federal or state court, even where the breach also constitutes an unfair labor practice.[6] In our case,

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6. Humphrey v. Moore, 375 US 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Dowd Box Co. v. Courtney, 368 US 502, 505-506, 511, 82 S.Ct. 519, 7 L.Ed.2d 483; Local 174 Teamsters, etc. v Lucas Flour Co., 369 US 95, 101, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); Smith v. Evening News Assn, 371 US 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962); Atkinson v. Sinclair Refining Co., 370 US 238, 82 S.Ct. 1318, 8 L. Ed.2d.462 (1962).

however, the task is simpler, because no one contends there was an unfair labor practice here.

In enacting the NLRA, Congress did not include breach of union contract among the labor practices made unlawful under Section 8. Proposals to do so were made in 1947 during the Congressional debates leading to the enactment of the 1947 amendments, but were rejected.[7]

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7. As stated in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp, 348 US 437, 75 S.Ct. 488, 99 L.Ed. 510 (1955) in discussing the LMRA: "It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' (H.R. Conf. Rep No. 510, 80th Cong, 1st Sess 42)." (Underlining supplied)

A somewhat abortive attempt was once made by the NLRB to treat breaches of collective bargaining agreements

as unfair labor practices in Miranda Fuel Company, 140 NLRB 181, 51 LRRM 1584 [1962]. However, the Second Circuit denied enforcement of the NLRB order (NLRB v. Miranda Fuel Co., 326 F2d 172 [2d Cir 1963] and its jurisdiction to take cognizance of the breaches has been "cast in doubt" (73 Yale LJ 1215, 1237 [1964]). Subsequently, the NLRB has applied Miranda only with great timidity and only in racial discrimination cases and generally has been "spooked by its own jurisdictional limitations" (51 Texas LR 1037, 1075, 1076, 1079, 1084, 1108 [1973]; see also Smith v. Local No. 25 (5th Cir) 500 F2d 741, 747 [1974].

Irrespective of the NLRB's theoretical jurisdictional limits, it is of academic interest only here, for the NLRB has already determined it lacks jurisdiction of this controversy since it involves the "interpretation or reformation of equipment lease agreements" which " is not a refusal to engage in collective bargaining as contemplated by Section 9(a) (5) of the Act" (NLRA). (Ex 18)

This court has held that a state court may assume jurisdiction even of labor disputes (and a breach of a lease agreement is not such dispute) where the NLRB has jurisdiction but declines to assert it. (Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc. 380 US 255, 85 S Ct 876, 13 L Ed 2d 789 [1965]. Further §14c was passed by an indignant Congress (29 USC §164[c]) to close the

When the bill which later became 29 USC §185a reached the Senate, Senator Ferguson (Dowd Box Co. v. Courtney, 368 US 502, 512, 82 S.Ct. 519, 7 L.Ed.2d. 483, 489):[8]

> "stated unequivocally that state court jurisdiction would not be ousted by enactment of the federal law."

Permitting state courts to enforce collective bargaining agreements is no disservice to the interest promoted by the federal labor statutes, since federal law still governs,[9] as the Oregon Supreme

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7. (cont) phenomenon of the no-man's land, shortly after Guss v. Utah Labor Relations Board, 353 US 1, 77 S.Ct. 598, 1 L.Ed.2d. 601 (1957) was decided. (See also 29 USC §523[a]).

8. It is now generally recognized that an employee may sue his employer to collect benefits accruing to the employee under a collective labor agreement made between his employer and the union, though the precise theory has given rise to some academic debate. See 2 Williston, Contracts (3rd ed) 985, §379A and Annotation, 18 ALR 2d 352; 3 Buffalo LR 270; McKay v. Loew's, Inc. (9th Cir 1950) 182 F.2d 170; Marranzano v. Riggs Nat. Bank (DC Cir 1950) 184 F.2d 349.

Court has acknowledged.[10]

ALL ALTERNATIVE REMEDIES WERE EXHAUSTED BY PLAINTIFFS PRIOR TO THE FILING OF THIS CASE, THIS WAS LITERALLY THE LAST RESORT. MOREOVER, EXHAUSTION OF ALL REMEDIES UNDER THE UNION AGREEMENT WAS NOT NEEDED ANYWAY SINCE THIS SUIT IS BASED UPON BREACH OF A SEPARATE LEASE AGREEMENT.

Defendant asserts that since plaintiffs allegedly did not fully exhaust the grievance procedures of the joint bargaining agreement this case should be dismissed.

There are several answers to this.

First, the primary claim in this case has no relationship to the joint bargaining agreement, but is predicated upon a breach of the lease. We ask merely that the

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9. Textile Workers Union v. Lincoln Mills, 353 US 448, 77 S.Ct. 912, 1 L.Ed.2d. 972 (1957); International Brotherhood of Boilermakers v. Hardeman, 401 US 233, 241, 91 S.Ct. 609, 615; 28 L.Ed.2d. 10 (1971); 51 Texas LR 1037, 1115 (1973).

10. 8a; see also State v. Berry, 248 Or 391, 434 P.2d 471 (1967).

unambiguous terms of the lease be enforced. In the words of the NLRB Regional Director, the issue here was the "interpretation" of "equipment lease agreements" (Ex 18).

Second, even though not required to do so, plaintiffs did exhaust all other possible avenues for redress. The filing of this lawsuit was the only route left. The extent of some of these efforts was capsulated by a very frustrated Roger Gilmore, one of the plaintiffs, when he wrote the following (Ex 29):

EXHIBIT
CASE No
NOW OFFERED &
OLSEN
JUDGE

3215 S.E. 135th Avenue
Portland, Oregon 97233
March 28, 1973

General Teamsters Auto Truck Drivers
& Helpers Local No. 162
1020 NE Third Avenue
Portland, Oregon 97232

Attn: Calvin Rogers,
Business Agent

Gentlemen and Brothers:

As you know, for years many of us have been trying to get Mitchell Brothers to live up to their agreement to pay all of us who are driver lessors what we are legitimately entitled to receive.

They refuse.

We have also tried for years to have these grievances heard some place, by someone. We first went to the NLRB--and they said they had no jurisdiction. We also went to Mitchell Brothers, and they told us, in effect, to drop dead. We also filed a grievance through the union, but we were told that this was the wrong route, too. Finally we filed a lawsuit in the Circuit Court for this county. In court, Mitchell Brothers insists that we must proceed through the union, although, of course, their true objective is to merely drive us into another blind alley. Mitchell Brothers also has urged us to sue the union. Of course, we have never wanted to do this and do not feel this would be right, and we have told Mitchell precisely this.

It is our clear understanding that the union--both local and international--does not wish to hear these grievances and would prefer that we take the matter to court. This we have been told many times. However, to make absolutely certain this is still your position, we called Clyde Crosby, the international representative, and he again referred us to you. We then made an appointment to see you on Friday at 9:00 A.M. However, you have now cancelled this appointment. We assume that once more the union does not wish to hear the matter. If such is not the case, please let us know at once.

Many thanks.

Fraternally yours,

Roger Gilmore

cc: Clyde Crosby

What he said was true. Not only for himself, but for the other plaintiffs as well.

Defendant tries to split the plaintiffs by stressing the actions of the two (Gilmore and Gilstrap) who were the most vocal. However, defendant does not mention that Gilstrap spoke not only for himself but also as a member of a committee of lessees who were elected to discuss these matters with defendant (23a).

Defendant implies plaintiffs did nothing until this lawsuit was filed. Such is false.

This case was filed December 24, 1970. For years both prior and subsequent to that date defendant was bombarded with complaints. Plaintiffs Gilstrap and Morris, for example, complained of these deductions when they received their first lease checks. For Gilstrap this was shortly after April

26, 1967. He continued to complain throughout both to the union and Mitchell, though told it would do no good. Finally, he was elected a member of a lessor committee intended to protect all of them, and filed a formal written grievance as well. Plaintiff Bland talked to the shop steward at Mitchell's, but was told "it would do no good to file a grievance because they were not going to get anywhere with it". He also talked to Mitchell's assistant general manager "often, whenever I would see him." He drove for Mitchell from 1961-4 and 1969-1971. Bob Pellissier, who had driven for Mitchell since February, 1962, testified the lessors asked Mitchell to make these tax payments "through the years."

Not only was it discussed individually by plaintiffs and other lessors, but it arose at virtually all--if not all--of the periodic meetings between Mitchell and the lessors.

From the beginning plaintiffs stressed their willingness to arbitrate or take the matter to the NLRB or anyplace wherever a fair hearing could be obtained. All these avenues proved to be dead ends. Mitchell did nothing except cry "wrong" as each successive possibility was exhausted. Its attitude towards arbitration is illustrated by its attorney's letter, after plaintiffs requested arbitration. He wrote the union (Ex 39):

> "Frankly, we would not object in the least if the Union does nothing and if the grievance procedures are not followed."

That is precisely what was done--nothing.

Mitchell blocked arbitration and refused to take any of the grievance steps. Mitchell should, in fairness, be estopped from raising the defense of exhaustion of remedies. The grievance procedures pertaining to lessor-drivers is found in Art. XXXI, Section 18. It provides:

> "(a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint committee in this area."

Yet Mitchell refused to submit owner-operator grievances (including plaintiffs') to the joint committee.[11]

The general grievance procedures for drivers appear in Art. VIII although, as the Oregon Supreme Court has noted, plaintiffs' claims "arise from the lease agreements" and not as drivers. Nevertheless, and even if it applied, it would not assist defendant. It sets forth a six-step grievance procedure (see le , infra, Appendix E).

The employee's role is limited to step one; i.e., he takes his grievance (and it

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11. Nor was this the only respect in which Mitchell refused to abide by the collective bargaining agreement or lease, as the Oregon Supreme Court mentioned. (See 21a, 22a).

need not be in writing, to his immediate supervisor". All successive steps are out of his control and must be taken by the union and/or employer. The Joint Committee, for example, is appointed half by management, half by labor. They, in turn, select an Arbiter, if needed.

Mitchell declined to take any of the steps, including the appointment of its half of the joint committee and/or arbiter--and so did the union.

Even more revealing is Mitchell's contemptuous attitude towards the entire grievance procedure. When asked whether Mitchell would be willing to abide by a decision of an arbitrator (if one were to be appointed and if the arbitrator ruled against Mitchell), Mitchell's attorney replied (Tr 235):

> "No, absolutely not. We will find other realistic arbitrators."

Only once over the years has any lessor-driver been able to invoke the grievance procedures, despite the fact that Mitchell employs upward of 100 of them. Even then, no decision was reached as to the merits of the claim. Rather, Mitchell managed to prevail on one of its many procedural defenses. Further, that grievance hearing postdated the filing of plaintiffs' complaint, a fact which raises a high index of suspicion as to the true motivation. Moreover, the type of hearing given that lessor (Logan) does not bode well for the success of that route. He filed his own grievance and tried to represent himself at the arbitration. Logan went to the hearing room with all his "folders and stuff in my hand". He was met by the union attorney, who told Logan "he was going to put on my case", and secondly:

> "to shut my mouth up. I tried to get this grievance filed with Mitchell Bros., and he assured me

> that they were not going to file them that day--that I was not allowed to file one grievance on the joint conference and actually I intended to get that grievance filed, and he told me several times to shut my mouth or the meeting would be adjourned."

Needless to say, he did not feel the union was protecting his interest (Tr 255).

In the end, Logan lost.

Plaintiffs encountered this same indifference--only more so--when they asked the union to assert the claims at bar.

The union's insouciance is illustrated by:

(a) their pointed refusal to file grievances for the lessor-drivers;

(b) the union's business agent never took the time to obtain a copy of the lease between Mitchell and any of its lessor-drivers, much less read it;

(c) the union business representative led the lessors to believe there was nothing in the union "contract

whatsoever covering owner-operators' leased equipment", and "there was nothing under the [union] contract that covers owners-operators". The union told plaintiff Gilstrap, regarding the unpaid bonus agreement, that:

> "it was not under their jurisdiction, that they had no control of any contracts made between Mitchell Bros. and the truck owner-operators, and also that it was never reduced to writing like the agreement was between the company and the union, and they refused to take any action for bonus money I had coming".

(d) the union was oblivious or indifferent to the fact that as wage increases were negotiated, Mitchell deducted an equivalent amount from the lease settlements.

(e) efforts to interest the International met the same fate.

The union attorney told plaintiffs that "since they had entered into individual

lease agreements with Mitchell Bros. and did the same on their own initiative, he refused to help". When two plaintiffs tried to talk to him (and two other union representatives), they were told to "shut up" and not to bother him "because he was a busy man". Neither one "got to say hardly anything".

Once more, the lessors received no union help.

IT IS NOT NECESSARY TO EXHAUST COLLECTIVE BARGAINING GRIEVANCE PROCEDURES, WHEN IT WOULD BE FUTILE TO RESORT TO SUCH PROCEDURES OR THE UNION HAS NOT PROVIDED FAIR OR ADEQUATE REPRESENTATION. BOTH FACTORS ARE PRESENT HERE.

Plaintiffs do not sue as drivers or as union members, but as lessors. Therefore, it was not necessary to exhaust the grievance procedures of the collective bargaining agreement, in order to recover for the breach of the unrelated lease agreement. But even assuming, purely arguendo, these first two facts were not

true, still defendant's defense is not supportable because it is not necessary to exhaust grievance procedures under a collective bargaining agreement when:

(a) the union has breached its duty of fair representation, or

(b) resort to such procedures would be futile.

Both were present here, as the Supreme Court of Oregon has determined (28a).

In addition, defendant has waived this defense--and is also estopped from doing so--because:

(a) For years defendant refused to appoint its half of the grievance committee and in plaintiffs' case in particular;

(b) plaintiffs could not invoke the grievance procedure beyond step 1, which they took. Only management and/or the union could do so--and both refused.

(c) defendant announced in advance it would not abide by any arbitration decision anyway unless that decision were favorable to itself.

THE UNION DID NOT PROVIDE FAIR REPRESENTATION TO PLAINTIFFS.

This court, and many others, have long recognized it is not necessary to pursue the collective bargaining procedure where the union declines to fairly represent the grievant.[12] Under such circumstances the

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12. Glover v. St. Louis-S.F. Rr, 393 US 324, 89 S.Ct. 548, 21 L.Ed.2d. 519, (1969); Czosek v. O'Mara, 397 US 25, 28, 90 S.Ct. 770, 25 L.Ed.2d. 21 (1970); Conley v. Gibson, 355 US 41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d. 80 (1957); Vaca v. Sipes, 386 US 171, 186, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967); Hiller v. Liquor Salesmen's Union (2d Cir), 338 F.2d. 778; Hardcastle v. Western Greyhound Lines (9th Cir) 303 F.2d 182, cert den 371 US 920, 83 S.Ct. 288, 9 L. Ed.2d. 229; Schum v. South Buffalo Ry Co (2nd Cir 1974), 496 F.2d 328; de Arroyo v. Sindicato etc, (1st Cir 1970), 425 F.2d 281, 283, cert den 400 US 877 (1970); Seay v. McDonnell Douglas Corp (9th Cir 1970), 427 F.2d 996, 1002; Smith v. Pittsburgh Gage & Supply Co., (3rd Cir 1972) 464 F.2d 870, 875.

grievant may test the merits of his claim in court, rather than be forced into a grievance hearing where the cards are stacked against him. Since unions are the beneficiaries of considerable delegated federal power, responsible government must be concerned with the way in which such private organization exercises such power[13] and has every right to expect that due process be extended to such proceedings.[14]

Despite the contrary implications in defendant's brief, it is not necessary to show union bad faith, deceit, malice or dishonesty in order to state a claim for relief for breach of duty of fair

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13. Steele v. Louisville & Nashville Ry Co., 323 US 192, 202, 65 S.Ct. 226, 89 L.Ed. 173 (1944); 67 Yale L.J. 1327, 1340 (1958).

14. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO v. Hardeman, 401 US 233, 246, 91 S.Ct. 609, 617, 28 L.Ed.2d. 10, (1971).

representation,[15] although such conduct would necessarily suffice. The Oregon Supreme Court adopted the following (14a, ftn):

> "'A bad-faith standard of fair representation cannot enforce the union's affirmative responsibilities. It can prohibit invidious distinctions like race and possibly sex, and it can inhibit deliberate attempts to sacrifice the rights of individual employees, but it cannot ensure that a union will offer minimal representation to all the employees it serves. In brief, a bad-faith standard allows unions to make unfounded decisions as long as there is no evidence of deliberate wrongdoing.' 51 Tex L.Rev. 1119 (1973)."

Even defendant concedes, at another point in its brief,[16]--and so does one of

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15. Vaca v. Sipes, 386 US 171, 191, 87 S.Ct. 903, 917, 17 L.Ed.2d. 842 (1967); Retana v. Apartment, Motel, Hotel and Elevator Operators Union (9th Cir 1972) 453 F.2d 1018, 1024; deArroyo v. Sindicato (1st Cir), 425 F.2d 281, cert den 400 U.S. 877 (1970); Beriault v. Local 40, Super Cargoes & Check of I.L.& W.U. (9th Cir 1974), 501 F.2d. 258, 264; Gillam v. Roadway Express, Inc., 1 Ohio App 2d. 548, 206 N.E. 2d. 34 (1965).

16. Petitioner's Br, p 25.

the two cases cited by defendant[17] (which it lists in support of its mistaken impression that there is a conflict in the Circuits on this point)--that arbitrary conduct on the part of the union is sufficient to constitute a breach of the duty of fair representation. Such has long been the rule of this court, and generally.[18]

In a recent case cited by defendant it was noted (Beriault v. Local 40 [9th Cir 1974], 501 F.2d 258, 264):

> "At least three other circuits also have examined the duty of

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17. Orphan v. Fernco Cons Corp (7th Cir 1972), 462 F.2d 794, 802

18. Amalgamaged Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 299, 91 S.Ct. 1909, 1924, 29 L.Ed.2d. 473 (1971); Vaca v. Sipes, 386 U.S. 171, 193, 87 S.Ct. 903, 17 L.Ed.2d. 842 (1967); Czosek v. O'Mara, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d. 21 (1970); Retana v. Apartment, Motel, etc. Union (9th Cir, 1972), 453 F.2d 1018; Griffin v. UAW (4th Cir 1972) 469 F.2d 181; Day v. UAW (6th Cir 1972), 466 F.2d 83; de Arroyo v. Sindicato (1st Cir 1970), 425 F.2d 281, 284; 51 Texas L.R. 1037, 1100 (1973).

> fair representation after both Vaca v. Sipes and Lockridge have concluded, as did we, that mere arbitrary conduct by the union in representing those within a particular bargaining unit constitutes a breach of that union's duty. Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir 1973); Woods v. North American Rockwell Corp, 480 F.2d 644, 648 (10th Cir 1973); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir 1972)."

One would be hard put to find a clearer example of arbitrary and discriminatory conduct than for a union to intentionally decide in advance to ignore and to sacrifice the interests of those of its members who were also lessors of trucks, irrespective of the merits of whatever grievances might later arise. Yet this is what the Teamsters did in this instance. In Steele v. L & N R Co., 323 U.S. 192 (1944), 65 S.Ct. 226, 89 L.Ed. 173), Chief Justice Stone said:

> "(W)e think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights

> of the minority of the craft, without imposing on it any duty to protect the minority."

He added (lc 202):

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates."

It is also an obvious truism that a union may as easily damage the interest of its members by inaction, as well as action. To systematically ignore a meritorious grievance by refusing to process it, has been repeatedly held to be a breach of fair representation.[19] As stated (Vaca v.

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19. Czosek v. O'Mara, 397 U.S. 25, 90 S. Ct. 770, 25 L.E.2d 21(1970); Vaca v. Sipes, 386 U.S. 171, 194, 87 S. Ct. 903, 17 L.Ed.2d. 842 (1967); Schum v. South Buffalo Ry Co (2nd Cir 1974), 496 F.2d 328; Retana v. Apartment, Motel etc Union (9th Cir 1972), 453 F.2d 1018; Griffin v. UAW (4th Cir 1972), 469 F.2d 181; Smith v. Pittsburgh Gage (3rd Cir 1972), 464 F.2d 870;

Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967):

> "a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion . . ."

So aloof and lackadaisical was the union here to the fate of the drivers (who were also lessors) that no one could recall a single grievance ever processed by this union for any lessor prior to our case. The union would do nothing for them, irrespective of the degree of outrage. Attempts by plaintiffs to visit with the union attorney were greeted with outbursts

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. (cont) see Republic Steel Corp v. Maddox, 379 US 650, 652, 85 S.Ct. 614, 13 L.Ed.2d. 580 (1965). In Elgin, Joliet & E.R.R. v. Burley, 325 U.S. 711 (1945), aff'd on rehearing, 327 U.S. 661 (1946) it was held that only the clearest of congressional purpose would justify the courts in allowing unions ". . . to submerge wholly the individual and minority interests. . not only in the forming of contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation."

to "shut up" and not to bother him "because he was a busy man".[20]

Many courts and others feel that even the perfunctory handling of a grievance is sufficient in extreme cases to constitute a breach of the duty of fair representation.[21]

Never--the union stance here--is about as perfunctory as one can get!

A fortiori, hostility and invidious discrimination--the union attitude here--

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20. Tr 108.

21. deArroyo v. Sindicato de Trabajadores Packinghouse (1st Cir), 425 F.2d 281, cert den 400 U.S. 877; Griffin v. UAW (4th Cir 1972), 469 F.2d 181, 184; see Republic Steel Corp v. Maddox, 379 U.S. 650, 652, 85 S.Ct. 614, 13 L.Ed.2d. 580 (1965); 51 Tx LR 1037, 1097, 1100; 51 Tx LR 1119, 1200;

As stated by Douglas, J. (dissenting) in The Emporium Capwell Co. v. Western Addition Community Organization, U.S. , 95 S.Ct. 977, 43 L.Ed.2d. 12 (1975):

"The inertia of weak-kneed, docile union leadership can be as devastating to the cause of racial equality as aggressive subversion."

almost, by definition, constitute sufficient grounds to find a breach of fair representation.[22]

There can be little doubt that (Schum v. South Buffalo Railway Co. [2nd Cir 1974], 496 F.2d 328, 331):

> "As a general rule, grievances do not succeed without the full support of the union. Normally employees do not have the expertism, knowledge or experience to interpret the complicated substantive and procedural provisions of a collective bargaining agreement. In addition, specialized skill and insight are required at the higher levels of the

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22. Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d. 80 (1957); Cunningham v. Erie RR (2nd Cir 1966), 358 F.2d 640; Day v. UAW (6th Cir 1972), 466 F.2d 83; Griffin v. Int U. (4th Cir 1972), 469 F.2d 181; 51 Tx LR 1037, 1096 (1963); 118 Pa LR at 216; Seay v. McDonnell Douglas Corp (9th Cir 1970), 427 F.2d 996; Magallanes v. Laborers, Local 300, Cal Rptr ___, 75 Labor Cases 16,982 (1974), cert den ___(1975).

> grievance procedures to investigate and marshall the relevant facts and law, to prepare adequate petitions and briefs, to comply with the intricate limitations periods common to all labor contracts, and to present persuasive arguments to the board of arbitration."

Plaintiffs could only take step one of the six-step grievance procedure. They did. Many times, in fact. All other steps were within the exclusive control of management and/or the union. Both declined to lift a finger. In no way could this be regarded as fair representation.

WHERE PURSUIT OF THE GRIEVANCE PROCEDURES WOULD BE A FUTILITY, SUCH POINTLESS EXERCISE IS NOT REQUIRED

The Supreme Court of Oregon, in keeping with the rulings of this court and universal principles,[23] recognized that if further

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23. Glover v. St. Louis-S.F.R.R., 393 U.S. at 330-331, 89 S.Ct. at 552, 21 L.Ed.2d. 519; Steele v. Louisville & Nashville R.R., 323 U.S. 192, 206-7, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Orphan v. Fernco (7th Cir 1972) 462 F.2d 794, 801; Schum v. South Buffalo Ry Co (2nd Cir 1974) 496 F.2d 328;

pursuit of grievances would be pointless, such nonsensical action would not be required. The futility of such procedure was amply demonstrated. Both union and management adamantly declared their complete unwillingness to reconsider grievances of lessor-drivers, regardless of merit.

Defendant suggests there is a conflict in the Circuits with respect to the circumstances when the futility doctrine can be utilized. Such conflict is more academic than real; and certainly as applied to the blatant facts here.

Defendant cites Fulsom v. United Buckingham Freightline, Inc. (W.D. Mo 1970) 324 F.Supp 135, for the asserted proposition that the court there confined the doctrine of futility to instances of racial discrimination. There is nothing to indicate that Judge Becker naively believed the long accepted futility exception was restricted to racial cases. Unmistakably the law is

to the contrary.[24] A comment in 73 Yale LJ 1215, 1233, notes:

> "The facts of Steele involved racial discrimination, but it is clear that the rationale of the decision is not restricted to discrimination based on race."[25]

Defendant's second and final gambit suggests that two other cases confined the futility doctrine to instances of union/employer collusion. Such distinction would be one of wooden logic only. The first case cited (Orphan v. Fernco Construction Corp [7th Cir 1972], 462 F.2d 794) reversed a verdict for the employer. The court held that where only the union could invoke the grievance procedure, the failure of individual members to allege an exhaustion of intra-union remedies was not fatal to

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24. 51 Tx LR 1037, 1098-9 (1973).

25. See Wellington, Union Democracy and Fair Representation; Federal Responsibility in a Federal System, 67 Yale LJ 1327, 1335 (1958).

their bringing of the action against the employer for damages for breach of the agreement.[26]

The last case cited is Lusk v. Eastern Products Corp. (4th Cir 1970), 427 F2d 705. Lusk was decided on an incidental pleading issue.

Nothing in either Fernco or Lusk supports defendant's contention the futility exception is limited to cases of collusion between management and the union.[27]

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26. The same Circuit did not circumscribe the futility exception to instances of management--labor collusion in Waters v. Wisconsin Steel Works (7th Cir 1970), 427 F2d 476. Judge Swygert stated (lc 490):
"(W)e can envision situations in which Union representatives repeatedly have breached their duty of fair representation in previous dealings with an employee. In such cases the employee could reasonably believe that attempts to seek the aid of the union in presenting a grievance would be utterly futile, thus justifying his failure to exhaust remedies."

27. A later case from the 4th Circuit (Griffin v. International U. [1972] 469 F2d 181, does not appear to be a case of union-management collusion either.

INDEPENDENT STATE BASIS FOR THE DECISION OF THE OREGON SUPREME COURT. DEFENDANT HAS WAIVED THE GRIEVANCE PROCEDURES SET FORTH IN THE COLLECTIVE BARGAINING AGREEMENT AND SHOULD BE ESTOPPED

There is more than adequate independent state basis to support the decision below, because defendant:

(a) ignored the collective bargaining agreement in many respects, as mentioned by the Oregon Supreme Court. For example, by refusing to insert the mandated language of the collective bargaining agreement into the lease, and refusing to file a copy of the lease with the union, both specific requirements;

(b) refused to comply with the arbitration provisions of the collective bargaining agreement by appointing any member to the joint grievance committee;

(c) announced it would not abide by any award which might be made by the arbitrators, unless that award favored defendant.

OTHER CASES CITED BY THE DEFENDANT DISTINGUISHED

Defendant cites:

(A) Emporium Capwell Co. v. Western Addition Community Organization, ___US___, 95 S Ct 977, 43 L Ed 2d 12 (1975).

In Emporium several employees attempted to circumvent their union by filing a complaint with the NLRB, during a time when the union was actively prosecuting their claims, and had indicated "it would process every such grievance through to arbitration if necessary." The union demanded the joint union-management Adjustment Board be convened "to hear the entire case." When the Adjustment Board meeting

convened, four of the employees (whose testimony the Union had intended to elicit) refused to participate in the grievance procedure and stalked out of the hearing. They also conducted their own private picketing and insisted on talking with Emporium's president. This court held that such employees could not bypass their exclusive bargaining representatives in this fashion.

In our case both union and management refused to do anything whatsoever. Finally plaintiffs filed a charge with the NLRB, but the latter ruled it had no jurisdiction either.

(B) Vaca v. Sipes, 386 US 171, 87 S Ct 903, 17 L Ed 2d 842 (1967).

Vaca held that the union had provided the employee with fair representation. The union had actively pushed plaintiff's claim through four successive grievance

steps. It then hired a doctor at union expense, to make an examination of plaintiff. That doctor confirmed that plaintiff, who had a long standing condition, did indeed have high blood pressure. At that point, the union decided to proceed no further. Though resolving the merits in favor of the union, this court recognized the state court did have jurisdiction of the case, as well as similar cases against the employer, and that such jurisdiction was not preempted by the NLRB. Justice White stated (l.c. 185):

> "We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. ***Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of

bargaining agreements by wrongful union conduct in the enforcement of such agreements."

(C) Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge, 403 US 274, 91 S Ct 1909, 29 L Ed 2d 473 (1971)

Lockridge was suspended from the union and from his employment under the union security clause. He made some efforts, with the support of the secretary treasurer of the union local, to gain reinstatement in the Union. No charges were filed before the NLRB. Instead, he filed suit in the Idaho state court against the union.

In our case, plaintiffs received no union assistance. Plaintiffs did file charges with the NLRB, but the District Director refused to proceed because the NLRB lacked jurisdiction.

CONCLUSION

Defendant would have this court

accept a mindless and boundless extension of the preemption rule, which would bar an employee from suing his employer, even where the employer has:

> breached a lease which is entirely independent from the collective bargaining agreement; and even where all other possible avenues for redress have been fully exhausted.

Contracts between employees and their employer should be enforced in keeping with traditional principles. A fortiori, contracts between lessors and lessees should also be enforced according to their terms, even though the lessor is also an employee of the lessee. The ipse dixit of management and/or the unions is no substitute for the agreement which has been made.

Neither is it true that defendant will be subjected to enormous losses by this case. Plaintiffs seek merely the recovery

of those sums which have been illegally withheld from them by defendant. Their contract should be upheld.

Respectfully submitted,

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May 20, 1975

APPENDIX B

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

ELDON GILSTRAP, WARREN P. BLAND, ROGER GILMORE, CLAUDIO MARTINEZ, RAYMOND MORRIS and C. P. ZACHOW,	)	
Plaintiffs,	)	No. 365-431
vs.	)	
	)	OPINION
MITCHELL BROS. TRUCK LINES, an Oregon corporation,	)	
Defendant.	)	

This case came into court as a class suit in which the plaintiffs in their own name and on behalf of others similarly situated sought certain relief from the defendant. This Court preliminarily determined that the plaintiffs' remedy was in law and not in equity, and that a class action was not permitted under the Oregon procedure. Thereafter the plaintiff Gilstrap amended his complaint to set forth several causes of action. It was agreed by all the parties that rather than file separate complaints for each of the remaining plaintiffs, their causes of action could be combined with Gilstrap's causes of action. In effect, each plaintiff has filed a separate complaint and all of the complaints have been consolidated for trial.

The plaintiffs are all lessor-drivers of truck equipment leased to the defendant. Each of the plaintiffs has signed a lease of his equipment similar to plaintiffs' Ex. 13. The plaintiffs were all members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. The Locals to which the plaintiffs

belonged entered into a collective bargaining agreement with the Oregon Draymen and Warehousemen's Association. The defendant is a member of the Association and, therefore, all parties hereto are in effect parties to the agreement. (Ex. 22)

In their complaints the plaintiffs first seek damages for breach of the Equipment Lease as the same was amended by an oral agreement made in July, 1969. Apparently the drivers had been negotiating with the defendant for an increase in truck rental rates. A meeting was held with management and the drivers, and in the course of the meeting the company agreed that henceforth it would pay a bonus of 3/4¢ for each mile driven by a driver in a one-year period provided the driver did not have claims charged to him that aggregated more than $250 in the period.

Both the plaintiffs and the defendant agree that the bonus was to be paid annually, and that it was to be computed at the rate of 3/4¢ per mile. The disagreement between the plaintiffs and the defendant revolves around the meaning of the word "claims". The plaintiffs contend that the only claims that should be considered in arriving at the $250 figure were cargo damage claims. The defendant, on the other hand, contends that all claims, regardless of fault on the part of the owner-operator arising out of and paid in the course of the undertakings of the drivers, were to be considered when computing the total of chargeable claims. Such claims would include cargo, industrial accident and third party liability claims.

Many people testified in regard to this question. It is apparent that the plaintiffs' contention that only cargo claims

should be considered is too restrictive. The preponderance of the evidence supports the defendant's position.

Parties for both the plaintiffs and the defendant and their witnesses spoke of the 3/4¢ bonus as a "safety bonus", a bonus designed to encourage drivers to actively practice safety and thereby minimize claims. In my view safety involves more than mere absence of fault. It involves a conscious effort to avoid accidents and injuries.

I recognize that some apparently unfair results occur when the construction I have placed on this aspect of the agreement is adopted. One of the witnesses spoke of a claim that resulted when a youngster dropped something on his truck from a bridge under which the driver was driving. I appreciate that such seemingly unfair results will occur. However, these occurrences should be infrequent, and I would hope that the defendant would give some consideration in calculating "claims" to the fact that some claims clearly are unavoidable and bear no relation to safety practices.

In the second cause of action the plaintiffs seek payment of a bonus in the amount of 3 and 1/3¢ per mile driven by the plaintiffs while hauling "permit loads". At the meeting referred to above in July, 1969, payment of the permit load bonus was discussed. The drivers were suggesting a payment in the amount of 10¢ per mile. The defendant maintained that such a bonus should not exceed 3 and 1/3¢ per mile. The matter was, however, never resolved, i.e. no enforceable agreement was made, until a date not applicable to the periods involved in this law suit. I conclude, therefore, the plaintiffs must fail as to their second cause of action.

The third cause of action relates to Paragraph 4 of the Equipment Lease, which provides in part:

> "Lessee agrees to assume full responsibility for *** highway use taxes, mileage fees; tolls and State regulatory permits."

It is the position of the plaintiffs that the term "highway use taxes" includes taxes imposed by §4481 of the Internal Revenue Code entitled "Tax on Use of Certain Highway Motor Vehicles". I have considered the evidence offered by all parties and read the memoranda of the parties. It appears inescapable that the tax imposed by §4481 is in fact a highway use tax and it is includable within Paragraph 4 of the Equipment Lease. The defendant should reimburse plaintiffs for all federal highway use taxes deducted from plaintiffs' settlements during the applicable periods.

A more difficult question is raised by plaintiffs' fourth cause of action, which relates to federal fuel taxes which were charged against the plaintiffs by the defendant.

*Article XXXI of the Collective Bargaining Agreement provides in §10 in part as follows:

> "The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax ***. All taxes or additional charges imposed by law relating to actual truck operation and use of highways no matter how computed or named, shall be paid by the carrier ***."

In my opinion this question is governed by

the case of Asbury Transportation Company v. Consolidated Freightways Corporation, 95 OAS, p. 1131. In that case the language contained in the Collective Bargaining Agreement was interpreted. The Court concluded that the wording in the Collective Bargaining Agreement imposed a duty upon the carrier to pay, among other taxes, the federal fuel taxes. Again, I have considered the briefs of counsel and I can conceive of no valid reason why this case should be distinguished from the case of Asbury, supra.

Defendant urges this case is distinguishable from Asbury for two reasons: (1) The equipment lease made no reference to the bargaining agreement as was the fact in Asbury; and (2) the lease construed in Asbury provided the carrier would "bear and pay" the taxes - in Ex. 13 the carrier's obligation was to "pay" the taxes. Defendant suggests it performed the lease when it in fact paid the fuel tax. However, as the lease did not require defendant to "bear" the tax, it was free to charge payment back against the plaintiffs.

The lease did not refer to the bargaining agreement. However, the bargaining agreement, which was binding upon both parties to this litigation, provided that all equipment leases such as Ex. 13 contain the following mandatory language:

> "*** To the extent that any provision of this lease may conflict with the provisions of the Oregon Draymen and Warehousemen's Association agreement as it applies to equipment driven by the owner, such provision of this lease shall be null and void and the provisions of such Agreement shall prevail." Ex. 22, Art. XXXI, §19.

I conclude the provisions of the bargaining agreement relating to payment of taxes is in conflict with the equipment lease. (Ex. 13). Simply stated, I find that §10, Art. XXXI, is to be considered a part of the equipment lease the same as if it were set forth in haec verba.

In my view if a contract provides that one party will "pay" a specified obligation which is a subject of the agreement, as between the parties and absent any language requiring the other party to reimburse the payor, the payor will "bear" as well as "pay" that obligation.

Several witnesses testified they were told when they entered into their equipment leases with the defendant that Mitchell Bros. Truck Lines would not be responsible for federal fuel taxes. The plaintiffs in this case, however, uniformly denied any such arrangement with Mitchell Bros. at the time their leases were made. In any event, the lease has to be read in light of its unambiguous wording and the unambiguous wording of the bargaining agreement without alteration or variance. If Mitchell Bros. intended to contract on the basis that it would not be responsible for federal fuel taxes, they could easily have said so in the lease agreement which they prepared. The plaintiffs should recover on their fourth cause of action.

I understand from the attorneys for the parties that the defendant will provide the data upon which the plaintiffs' damages can be computed. Mr. Tilbury will prepare judgments reflecting such calculations for each of the plaintiffs. This opinion can stand as findings and conclusions.

Dated this 31st day of July, 1973.

/s/ Clifford B. Olsen
CLIFFORD B. OLSEN

APPENDIX C

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
PORTLAND, OREGON 97204
248 3247

CLIFFORD B. OLSEN
JUDGE

August 9, 1973

Mr. Roger Tilbury
Attorney at Law
1123 S. W. Yamhill
Portland, Oregon 97205

Mr. Alex L. Parks
Attorney at Law
Jackson Tower
Portland, Oregon 97205

Re: Gilstrap et al. vs Mitchell Bros. Truck Lines
No. 365-431

Gentlemen:

Subsequent to the Opinion previously entered in this case I received a communication from the attorney for the defendant regarding the application of §3, Article VIII, of the Collective Bargaining Agreement to the controversy before the Court. On August 9, 1973, the parties through their attorneys appeared in court, and this problem was discussed.

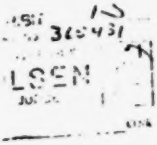
It is my opinion that this law suit involves a claimed breach of the equipment leases between the plaintiffs and the defendant. I do not think that §3, Article VIII, or the grievance procedures are made a part of the equipment lease by virtue of §19, Article XXXI. The plaintiffs, therefore, are entitled to judgment on their fourth causes of action for the period expressed in the pleadings and not necessarily limited to claims made within 90 days of a written demand by the plaintiffs or any of them.

Very truly yours,

Clifford B. Olsen
Circuit Judge

CBO:nt

APPENDIX D



MITCHELL BROS. TRUCK LINES
EQUIPMENT LEASE

Truck 1617 Trailer 1617 A

City Portland County Multnomah State Oregon Date 8/1/68

This is to certify that Mitchell Bros. Truck Lines, hereinafter called Lessee has received and rented from Raymond Morris hereinafter called Lessor, the following described truck and/or trailer:

TRACTOR OR TRUCK

Make Freightliner Year 1966 Type 3 ax Tras Model

Motor No. AF21732 State License No. State Oregon

Tire Sizes 10:00 x 22.

SEMI TRAILER OR TRAILER

Make Utility Year 1966 Model 2 ax Serial No. E13884

Type Flatbed State License No. State Oregon Tire Sizes 10:00 x 22

To be used by Lessee in transporting property in interstate and intrastate commerce between points which Lessee is lawfully authorized to serve.

It is mutually agreed and understood between Lessor and Lessee that:

1. Lessee shall maintain at all times during the period of this lease complete and exclusive jurisdiction, control, operation and possession of said described vehicle or vehicles, and drivers.

2. Lessor warrants that the equipment leased hereunder is in good repair and good, safe, roadworthy condition.

3. Lessee agrees to operate said equipment at all times in compliance with all laws and regulations of any Federal or State agency affecting the operation of such vehicles.

4. Lessee agrees to assume full responsibility for the equipment leased while the same is in Lessee's possession, said responsibility to include public liability, property damage, and cargo insurance, highway use taxes, mileage fees, tolls and State regulatory permits.

5. Lessee shall pay to Lessor for the use of said equipment during the period of the lease the sum of .31¢ cents per running mile, to include maintenance and depreciation.

6. Lessor understands and agrees that the above payment per mile by Lessee is payment in full for the lease of said equipment with driver.

7. Lessee shall not be liable for any damage caused to Lessor's equipment leased hereunder by fire, theft, collision or any other cause, unless on Lessee's permanent schedule.

8. Lessor agrees to carry a Collect policy, for liability and property damage to cover equipment for movement of vehicle when not under orders and control of Lessee.

9. Lessor shall maintain said equipment in good condition at his own cost during the period of this lease and further agrees that any expense necessary to properly license said equipment for the service contemplated herein shall be borne by Lessor and if said maintenance expense or licensing expense is paid by Lessee, the same may be deducted from the amount payable hereunder.

10. The driver of said equipment shall be placed on Lessee's payroll and paid in the same manner as other drivers in Lessee's employ, provided however, the driver's gross salary shall be deducted from the rental to be paid Lessor pursuant to Paragraph 5 above.

11. The term of this lease shall be for a period of not less than thirty (30) days beginning the 1st day of August, 1968 and ending the 1st day of November, 1968.

Executed the day and year first above written. Note: This lease may be extended or cancelled by mutual agreement of both parties.

MITCHELL BROS. TRUCK LINES
2300 N. W. 30th Avenue
Portland, Oregon 97210

By _____
Lessee

Raymond Morris
945 Lozier Lane
Medford, Oregon 97501

By Raymond S. Morris

APPENDIX B

ARTICLE VII

Joint Labor-Management Committee

Section 1.

Make-up of Committee

The Employer and the Union shall forthwith establish a permanent Joint Labor-Management Committee, herein referred to as Joint Committee. This Committee shall consist of three (3) members and six (6) alternates appointed by the Employers, three (3) members and six (6) alternates appointed by the Union. The selection, removal and replacement, of a chairman, shall be determined by the Committee members appointed by the Union and members appointed by the Employer. The chairmanship shall alternate between Employer and Union each six (6) months during the life of this agreement. The chairman shall have full voting powers. The Joint Committee shall formulate such rules of procedure to govern the conduct of its proceedings.

Section 2.

Function.

It shall be the function of the Joint Committee to settle disputes in accordance with the procedure set out in Article VIII.

Section 3.

Attendance.

Meetings of the Joint Committee to settle disputes in accordance with the procedure set out in Article VIII.

Section 4.

Procedure.

When a dispute arises involving the computation of compensation of any employee, such dispute shall be reduced to writing, giving the pay period of the alleged error and any other pertinent information needed, and presented to the Employer. Thereupon the authorized business representatives of the Union, and the Joint Committee shall have the right at the respective steps of the disputes procedure set out in Article VIII to examine time sheets and pay records of the affected employee.

Section 5.

Non-Members.

Articles VII and VIII do not apply to employers who are not members of the Oregon Draymen and Warehousemen's Association.

ARTICLE VIII

Disputes Procedure

Section 1.

Disputes.

All questions, disputes and controversies arising under this agreement or any supplement hereto, or between the parties as to employer-employee relations covered by this agreement, shall be adjusted and settled in the manner provided in this Article, unless otherwise expressly provided in this agreement. A copy of all decisions shall be issued to each Local Union and each member of the Oregon Draymen Association of the settlement of the dispute. The procedure for such adjustment and settlement shall be as follows:

Step 1. Any grievance of an employee shall first be taken up between such employee and his immediate supervisor.

Failing notification by an employee, the Representatives of the Union may file grievances alleging violation of the agreement.

Step 2. Failing settlement under Step 1, such grievance shall be taken up between a representative of the Local Union and the Employer.

Step 3. Failing settlement under Step 2, such grievance, and any question, dispute or controversy that is not of the kind that is subject to Steps 1 and 2, shall be reduced to writing and be referred to and taken up between the Secretary or other authorized representatives of the Local Union and the authorized bargaining representative of the Employer.

Step 4. Failing settlement under Step 3, the dispute shall be referred for settlement or decision to the Joint Committee. If the Joint Committee, by a majority vote, settles or decides the dispute, such decision shall be final and binding on both parties, and no appeal may be taken to an Arbiter, except as provided in Section 4 of this Article.

Step 5. If the Joint Committee is unable to settle or decide the dispute, it shall, at the request of the Union or the Employer involved be appealed to a seventh impartial representative who shall be the Arbiter. The decision of the Arbiter shall be final and binding on both parties.

Step 6. In the event a grievance or dispute is deadlocked at Step 5, the grievance or dispute shall be submitted to arbitration and the Arbitration Board shall be selected according to and shall be governed by the following procedure:

(a) The Board of Arbitration shall consist of three (3) members selected by the Union and three (3) members selected by the Association. In the event that these six (6) members of the Board of Arbitration fail to agree upon the disposition of a dispute or grievance within three (3) working days after the meeting for this purpose, then, at the request of either of these six (6) members of the Board of Arbitration, the Federal Mediation and Conciliation Service shall be requested to name a panel of seven (7) arbitrators, from which the six (6) arbitrators shall select the seventh and impartial arbitrator in the following manner:

(b) The six (6) arbitrators shall determine by lot the order of elimination, and thereafter each side shall in that order alternately eliminate one (1) name until only one (1) remains. The seventh (7th) or remaining person named shall thereupon be accepted by the six arbitrators as the seventh impartial arbitrator.

(c) The seven (7) arbitrators shall thereupon constitute the Board of Arbitration to decide the issue or issues involved. The award of the Board of Arbitration must be rendered within fifteen (15) days after the matter is finally submitted to the Board and shall be binding upon the parties and shall be complied with within five (5) working days after the decision is rendered.

(d) The Board of Arbitration shall not have the power or authority to add to, subtract from, or modify the terms of this agreement.

(e) Expenses and compensation of the seventh arbitrator shall be divided equally between the Employer and the Union

Section 2.

Time Limitations.

Except as otherwise specifically provided in this agreement, all grievances and disputes shall be submitted to the Joint Committee within thirty (30) days of the date of the occurrence of the matter upon which the grievance or dispute is based. Any such grievance or dispute not submitted within such time shall be waived unless the Joint Committee by majority vote for good cause accepts such submission or unless the Employer has intentionally concealed the facts upon which the grievance or dispute is based.

Section 3.

Money Disputes.

Any dispute as to the amount of money due any employee under this agreement or any supplement hereto shall be submitted in writing to the Employer or his authorized bargaining representative for investigation and adjustment. Any such dispute not submitted within ninety (90) days of the pay day on which any such amount of money is claimed to have become due shall be deemed waived unless the Employer intentionally conceals the facts from which such dispute arises. This ninety (90) day limitation shall not be applicable if it is in conflict with State or Federal law. If such dispute shall not have been adjusted or settled to the satisfaction of parties concerned within five (5) days, exclusive of Saturdays, Sundays and holidays, after the submission of the complaint to the Employer or his authorized bargaining representative, the Union shall have the right to take such legal or economic action against the Employer as it may deem proper, unless the Employer on the sixth day shall post with the representative designated by the Joint Committee the amount claimed, or unless the Employer is covered as of the date of the claim by a bond of a kind and in an amount designated by the Joint Committee. If the Employer does not submit the dispute to the Joint Committee within ten (10) days, exclusive of Saturdays, Sundays and holidays, after submission of said complaint, the amount so claimed shall be paid. If the Employer does so submit the dispute to the Joint Committee, said dispute shall be determined according to the disputes procedure set out in this Article VIII of this agreement. If, in the consideration of any claim submitted under this section, it shall appear that any grievance or dispute is involved in connection therewith, other than a claim for money due, such grievance or dispute shall be considered and determined in the same manner as if it had been submitted in accordance with Section 1 of this Article.

Section 4.

Interpretation of Agreement.

All matters pertaining to the interpretation of any provision of this agreement or any supplement hereto may, at the request of any party, be referred for decision to the Joint Committee, such request to be in writing. Nothing contained in this section shall affect the rights of

ARTICLE XXXI

Owner-Operators

Section 1.

Coverage.

Owner-operators (See Note), other than certificated or permitted carriers shall not be covered by this Agreement unless affiliated by lease with a certificated or permitted carrier which is required to operate in full compliance with all provisions of this Agreement and holding proper ICC and State certificates and permits. Such owner-operators shall operate exclusively in such service and for no other interest.

NOTE: Whenever "owner-operator is used in this Article, it means owner-driver only, and nothing in this Article shall apply to any equipment leased except where owner is also employed as a driver.

Section 2.

Compensation and Seniority.

This type of operator's compensation for wages and working conditions shall be in full accordance with all the provisions of this Agreement and applicable agreements supplemental thereto. The owner-operator shall have seniority as a driver only.

Section 3.

Certificate and Title.

Certificate and title to the equipment must be in the name of the actual owner.

Section 4.

Management Rights.

In all cases, hired or leased equipment shall be operated by an employee of the

certificated or permitted carrier. The Employer expressly reserves the right to control the manner, means and details of, and by which, the owner-operator performs his services, as well as the ends to be accomplished.

Section 5.

Rotating Board.

Certificated or permitted carriers shall use their own available equipment, together with all leased equipment under minimum thirty (30) day bona fide lease arrangements, on a rotating board, before hiring any extra equipment.

Section 6.

Payment of Compensation.

Separate checks shall be issued by the certificated or permitted carriers for drivers' wages and equipment rental. At no time shall the equipment check be for less than actual miles operated. Separate checks for drivers shall not be deducted from the minimum truck rental revenue. The driver shall turn in time direct to the certificated or permitted carrier. All monies due the owner-operator may be held no longer than two (2) weeks, except where the lease of equipment agreement is terminated and in such case all monies due the operator may be held no longer than thirty (30) days from the date of the termination of the operation of the equipment.

Section 7.

Method of Payment.

Payment for equipment service shall be handled by the issuance of a check

for the full mileage operated, tonnage or percentage, less any agreed advances. A statement of any charges by the certificated or permitted carrier shall be issued at the same time, but shall not be deducted in advance.

Section 8.

Supplies to Be Purchased.

The owner-operator shall have complete freedom to purchase gasoline, oil, grease, tires, tubes, etc., including repair work, at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

Section 9.

No Deduction.

There shall be no deduction pertaining to equipment operation for any reason whatsoever.

Section 10.

Expenses to Be Paid by Employer.

The Employer or certificated or permitted carrier hereby agrees to pay road or mile tax, social security tax, compensation insurance, public liability and property damage insurance, bridge toll, fees for certificates, permits and travel orders, fines and penalties for inadequate certificates, license fees, weight tax and wheel tax, and for loss of driving time due to waiting at State lines, and also cargo insurance. It is expressly understood that the owner-driver shall pay the license fees in the State in which title is registered.

All tolls, no matter how computed, must be paid by the Employer regardless of any agreement to the contrary.

All taxes or additional charges imposed by law relating to actual truck operation and use of highways, no matter how computed or named, shall be paid by the carrier, excepting only vehicle licensing as such, in the State where title is registered.

Section 11.

Money Advanced.

There shall be no interest or handling charge on earned money advanced prior to the regular pay day.

Section 12.

Filing of Lease Agreements.

All certificated or permitted carriers hiring or leasing equipment owned and driven by the owner-driver shall file a true copy of the lease agreement covering the owner-driver equipment with the Oregon Draymen and Warehousemen's Association and the Local Union involved. The terms of the lease shall cover only the equipment owned and driven by the owner-driver.

Section 13.

No Reduction.

There shall be no reductions where the present basis of payment is higher than the minimums established herein for this type of operation. Where owner-operator is paid on a percentage or tonnage basis and the operating company reduces its tariff, the percentage or tonnage basis of payment shall be automatically ad-

justed so that the owner-operator suffers no reduction in equipment rental or wages, or both.

Section 14.

Other Agreements Dissolved.

It is further understood and agreed that any arrangements which have heretofore been entered into between members of the Union, either among themselves or with the Employer or with the aid of the Employer, applicable to owner-driver equipment contrary to the terms hereof, shall be dissolved or modified within thirty (30) days after the signing of this Agreement so that such arrangements shall apply only to equipment of the owner-driver while being driven by such owner driver. In the event that the parties cannot agree on a method of dissolution or modification of such arrangements to make the same conform to this Agreement, the question of dissolution or modification shall be submitted to arbitration, each party to select one (1) member of the arbitration board, and the two (2) so selected to choose a third (3rd) member of said Board. If the two (2) cannot agree upon the third (3rd) within five (5) days, he shall be appointed by the Joint Committee. The decision of said board to be final and binding.

Section 15.

Fleet Lease Arrangements.

It is further agreed that the intent of this clause and this entire Agreement is to assure the payment of the Union scale of wages as provided in this Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the pay-

ment of wage scale provided in this Agreement. This clause is intended to prevent the continuation of or formation of combinations or corporations or so-called lease or fleet arrangements whereby the driver is required to and does periodically pay losses sustained by the corporation or fleet arrangement, or is required to accept less than the actual cost of running of his equipment, thus, in fact, reducing his scale of pay.

Section 16.

Sale at Fair Value.

It is further agreed that if the Employer or certificated or permitted carrier requires that the "driver-owner-operator" sell his equipment to the Employer or certificated or permitted carrier, directly or indirectly, the "driver-owner-operator" shall be paid the fair true value of such equipment. Copies of the instruments of sale shall be filed with the Union and unless objected to within ten (10) days shall be deemed satisfactory. If any question is raised by the Union as to such value, the same shall be submitted to arbitration, as set forth above, for determination. The decision of the arbitration board shall be final and binding.

Section 17.

Lease Cancellation.

It is further agreed that the Employer or certificated or permitted carrier will not devise or put into operation any scheme whether herein enumerated or not, to defeat the terms of the Agreement, wherein the provisions as to compensation for services on and for use of equipment owned by owner-driver shall

be lessened, nor shall any owner-driver lease be cancelled for the purpose of depriving Union employees of employment, and any such complaint that should arise pertaining to such cancellation of lease or violation under this Section shall be subject to the Grievance Procedure of the agreement.

Section 18.

Handling Grievances.

(a) The use of individual owner-operators shall be permitted by all certificated or permitted carriers who will agree to submit all grievances pertaining to owner-operators to joint committee in this area. It is understood and agreed that all such grievances will be promptly heard and decided with the specific purpose in mind of:

1. Protecting provisions of the Union contract;

2. prohibiting any and all violations directly or indirectly of contract provisions relating to the proper use of individual owners;

3. prohibiting any attempts by any certificated or permitted carrier in changing his operation which will affect the rights of drivers under the terms of the contract, and generally the certificated or permitted carriers agree to assume responsibility in policing and doing everything within their power to eliminate all alleged abuses in the use of owner-drivers which resulted in the insertion of this Section 18;

4. the certificated or permitted carriers agree that they will, with a joint meeting of the Unions, set up uniform

rules and practices under which all cases will be heard;

5. no owner-operator shall be permitted to drive or hold seniority where he owns three or more pieces of leased equipment. This provision shall not apply to present owner-operators having three or more pieces of equipment under lease agreement, but such owner-operators shall not be permitted to put additional equipment in service so long as he engaged in work covered by this Agreement or holds seniority. Where such owner-operator drives, he can hold seniority where he works sixty percent (60%) or more of time.

Section 19.

Mandatory Language for Agreements.

All leases, agreements, or arrangements between carriers and owner-operators shall contain the following statement:

"The equipment which is the subject of this lease shall be driven by an employee of the lessee at all times that it is in the service of the lessee. If the lessor is hired as an employee to drive such equipment he shall receive as rental compensation for the use of such equipment no less than the minimum rental rates, allowances and conditions (or the equivalent thereof as stated in the lease, and, in addition thereto, the full wage rate and supplementary allowances for drivers) or the equivalent thereof as approved by the Oregon Draymen and Warehousemen's Association.

"The lessee expressly reserves the right to control the manner, means and de-

tails of, and by which the driver of such leased equipment performs his services, as well as the ends to be accomplished. To the extent that any provision of this lease may conflict with the provisions of the Oregon Draymen and Warehousemen's Association agreement as it applies to equipment driven by the owner, such provision of this lease shall be null and void and the provisions of such Agreement shall prevail."

ARTICLE XXXII

Stewards

The Employer recognizes the right of the Union to designate job stewards and alternates from the Employer's seniority list. The authority of job stewards and alternates so designated by the Union shall be limited to, and shall not exceed, the following duties and activities:

1. The investigation and presentation of grievances with his Employer or the designated company representative in accordance with the provisions of the collective bargaining agreement;

2. The collection of dues when authorized by appropriate Local Union action;

3. The transmission of such messages and information, which shall originate with, and are authorized by the Local Union or its officers, provided such messages and information—

(a) have been reduced to writing, or

(b) if not reduced to writing, are of a routine nature and do not involve work stoppages, slow downs, refusal to handle goods, or any other interference with the Employer's business.

Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slow down or work stoppage in violation of this Agreement.

Stewards shall be permitted reasonable time to investigate, present and process grievances on the Company property, without loss of time or pay during his regular working hours. Such time spent in handling grievances shall be considered working hours in computing daily and or weekly overtime if within the regular work schedule of the steward.

When the Union designates a Job Steward at an individual warehouse of an employer who has more than one warehouse, the Job Steward shall be assigned to the same warehouse in which he was designated as a steward unless it is necessary for the Job Steward to exercise his seniority to retain his employment.

ARTICLE XXXIII

Funeral Leave

In the event of a death in the family (father, mother, wife, husband, brother, sister, son or daughter), an employee with seniority shall be entitled to be paid for the day prior to and the day of the